

62142-4

62142-4

84223-0

84869-7

NO. 62142-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROGER SINCLAIR WRIGHT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIE SPECTOR

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHEN P. HOBBS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2009 JAN 26 PM 3:31

TABLE OF CONTENTS

I.	<u>ISSUES PRESENTED</u>	1
II.	<u>STATEMENT OF THE CASE</u>	2
	A. PROCEDURAL FACTS	2
	B. FACTUAL BACKGROUND: MOTION TO SUPPRESS	3
III.	<u>ARGUMENT</u>	10
	A. THE TRIAL COURT'S FINDINGS OF FACT ARE VERITIES ON APPEAL	10
	B. STANDARD OF REVIEW	10
	C. OFFICER GREGORIO HAD "REASONABLE AND ARTICULABLE SUSPICION" TO STOP WRIGHT'S CAR	11
	1. Legal standard: validity of investigative stops	11
	2. There was reasonable suspicion to stop Wright's vehicle	14
	D. OFFICER GREGORIO DID NOT ENGAGE IN A "PRETEXT" STOP	17
	1. Legal standard: "pretext" stops	17
	2. This was not a "pretext" stop	19

TABLE OF AUTHORITIES

Table of Cases

Federal:

<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	13, 14
<u>United States v. Ross</u> , 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982).....	14

Washington State:

<u>State v. Chapin</u> , 75 Wn. App. 460, 879 P.2d 300 (1994).....	19
<u>State v. Day</u> , 161 Wn.2d 889, 168 P.3d 1265 (2007).....	14
<u>State v. Duncan</u> , 146 Wn.2d 166, 43 P.3d 513 (2002).....	11, 13, 14, 15
<u>State v. Gaines</u> , 154 Wn.2d 711, 116 P.3d 993 (2005).....	11
<u>State v. Hoang</u> , 101 Wn. App. 732, 6 P.3d 602 (2000).....	19, 20, 23, 24
<u>State v. Johnson</u> , 128 Wn.2d 431, 909 P.2d 293 (1996).....	14
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	13, 14, 15
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	18, 19, 24
<u>State v. Montes-Malindas</u> , 144 Wn. App. 254, 182 P.3d 999 (2008).....	17, 18, 24, 25, 26

<u>State v. Myers</u> , 117 Wn. App. 93, 69 P.3d 367 (2003).....	24, 26
<u>State v. Rife</u> , 133 Wn.2d 140, 943 P.2d 266 (1997).....	13
<u>State v. Rowe</u> , 63 Wn. App. 750, 822 P.2d 290 (1991).....	14
<u>State v. Solomon</u> , 114 Wn. App. 781, 60 P.3d 1215 (2002).....	11
<u>State v. Walker</u> , 66 Wn. App. 622, 834 P.2d 41 (1992).....	13
<u>State v. White</u> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	13
<u>State v. Williams</u> , 102 Wn.2d 733, 689 P.2d 1065 (1984).....	12, 13

Constitutional Provisions

Washington State:

Const. art. I, § 7.....	12, 18
-------------------------	--------

Statutes

Washington State:

RCW 46.37.020.....	15
--------------------	----

Rules and Regulations

Washington State:

CrR 3.6.....	1, 2, 3, 11
--------------	-------------

I. ISSUES PRESENTED

1. Should the trial court's uncontested CrR 3.6 written findings-of-fact be treated as verities on appeal?
2. Did the trial court properly deny defendant Wright's motion to suppress?
3. Did Officer Gregorio have "reasonable and articulable suspicion" to stop Wright's vehicle for a possible traffic infraction after observing the vehicle driving without headlights when it was dark outside?
4. Does the fact that a headlight infraction had technically not been committed – because it was only 24 minutes, not 30 minutes, after sunset – render Officer Gregorio's stop improper?
5. Considering the totality of the circumstances, was there any basis to conclude that Officer Gregorio, either objectively or subjectively, engaged in a "pretext stop" of Wright's vehicle?
6. Is there any basis to suppress evidence obtained from the search of Wright's car as "fruits of the poisonous tree" or to reverse Wright's convictions for Possession of MDMA and Possession with Intent to Distribute Marijuana?

II. STATEMENT OF THE CASE

A. PROCEDURAL FACTS

Roger Wright was charged with Possession with Intent to Distribute 3,4 Methylenedioxymethamphetamine (commonly known as "MDMA" or "ecstasy") (count I) and Possession with Intent to Distribute Marijuana (count II). CP 1-6.

Wright filed a pre-trial motion to suppress. CP 13-21, 24-69. On June 24, 2008, the trial court held a CrR 3.6 hearing on this issue. RP 1-41. Following the hearing and argument of counsel, the trial court issued an oral ruling denying the motion to suppress. RP 57-65. The court subsequently memorialized its ruling in written Findings of Fact and Conclusions of Law. CP 81-87.

Wright waived his right to a jury trial and entered a Stipulated Facts and Waiver of Jury Trial pleading. RP 65-71; CP 70-71. On count I, the trial court found Wright guilty of the lesser-included offense of Possession of MDMA (ecstasy). On count II, the court found Wright guilty of Possession of Marijuana with Intent to Distribute. RP 79-80.

Wright was sentenced to two months on each count, to be served concurrently. One month of this time was converted to community service, the other month was served on electronic home

detention. CP 88-95. Wright has filed a timely notice of appeal.
CP 96-105.

B. FACTUAL BACKGROUND: MOTION TO SUPPRESS

The only witness at the CrR 3.6 hearing was Seattle Police Department Officer Chris Gregorio. Officer Gregorio testified as follows about the circumstances that led up to the initial stop of defendant Roger Wright.

On November 26, 2006, Officer Gregorio was on duty as a Seattle Police Department patrol officer. RP 5, 7. He was driving in his patrol vehicle on Waters Avenue South, approaching the intersection of South Roxbury Street. RP 7-8. This residential area was considered a "hot spot" based on a heightened number of burglaries and car prowls. RP 8, 32-33. Accordingly, it was not unusual to have more than one officer patrolling in the general vicinity. RP 8.

At 4:45 p.m., it was dark out and Officer Gregorio observed a vehicle driving without its headlights.¹ Officer Gregorio testified about his initial observations as follows:

¹ Officer Gregorio testified that when he wrote up his report shortly after the incident he based the time of the stop on the CAD report (the call history as documented by dispatch) and that this time was accurate. RP 31.

- Q. Do you recall what the weather was at the time [of the stop]?
- A. It was dark. It was kind of icy out. It was real cold.
- Q. Now you said it was dark. So had the sun set at that point?
- A. Yes, ma'am.
- Q. Do you have any memory of how long it had been since the sun set?
- A. I don't recall. I just remember it was dark out.
- Q. And what first drew your attention to the defendant's vehicle?
- A. He didn't have any headlights on when he was driving.

RP 9; see also RP 24-25, 31.

Officer Gregorio, travelling northbound on Waters Avenue, initially observed the vehicle traveling without lights one block away on a parallel street. RP 10-11, 25-27. The officer paused for "half a second" and then began to turn onto Roxbury, toward the vehicle. RP 10-11, 27-28. At the same time, the vehicle began to turn westbound on Roxbury, heading toward the patrol car. When the driver of the vehicle saw the officer's patrol car, the vehicle stopped, backed into 59th Avenue South, and then turned and headed eastbound on Roxbury, moving away from the officer. RP 11-12, 28. Officer Gregorio pulled behind the vehicle and initiated a traffic stop. RP 12-13.

When Officer Gregorio observed the vehicle travelling without headlights, he could not see inside the vehicle or identify the driver:

- Q. . . . And when you first saw the defendant's vehicle, when you were pulling onto Roxbury Street, could you see the defendant himself, or just the vehicle?
- A. Just the vehicle.
- Q. And what was the reason for stopping the vehicle?
- A. Driving without headlights on.

RP 40.²

Officer Gregorio testified that it was typical for him to stop vehicles that did not have their headlights turned on. RP 10, 28-29.

² Wright, in the first paragraph of the factual background section of his opening brief, states: "[Officer Gregorio] identified Mr. Wright as a 'black male,' and contacted him 'on South Roxbury Street' when the officer was driving north bound 'on Waters Avenue South.' *Id.* at 7-8." *Appellant's Opening Brief*, p. 3. This implies that the officer identified Wright as a "black male" *before* he initiated the traffic stop. This is not correct.

Examination of the citation to the record provided by Wright for this proposition reveals that the "black male" (in quotes) refers to Officer Gregorio's *identification of the defendant in court*:

- Q. Could you please identify him using location in the courtroom and an article of clothing?
- A. He is sitting at the table, *black male*, wearing a green shirt, button up shirt.

RP 7 (emphasis added). Nowhere else at RP 7-8 is Wright identified as a "black male." After identifying Wright in court, the inquiry shifted to what had occurred on November 26, 2006, and the officer testified he contacted Wright at that time. The suggestion that Officer Gregorio knew Wright was a "black male" before he initiated the stop is simply wrong. The officer's testimony was clear that he could not see the defendant inside the vehicle prior to initiating the stop. RP 40.

Indeed, he had done so the evening before the hearing. He usually issued the driver a warning, rather than a citation. RP 30-31.

In response to the question, "How long after seeing the defendant didn't have his headlights on did you stop him?" Officer Gregorio replied:

Seconds. I can't say exactly, but it wasn't a long period at all. Usually, I'll allow -- if I see somebody driving with their headlights off, I'll give them an opportunity to turn them on. If it doesn't happen, I'll usually initiate a traffic stop.

RP 10; see also RP 28-29.

As he initiated the stop, Officer Gregorio informed dispatch that he was making the stop, giving his location and the suspect vehicle's license number. RP 13, 29, 33-35. He also requested that another officer respond to the scene. RP 13, 35.

The vehicle had not been driving in a reckless manner and was not committing any other traffic infractions. RP 29. The vehicle pulled over in a safe and lawful manner after the officer initiated the traffic stop with his emergency lights. RP 31.

Officer Gregorio contacted the occupant of the vehicle, defendant Roger Wright, on the driver's side. RP 14. Wright was the only person in the vehicle. RP 13. During this initial contact

with Wright, Officer Gregorio noticed a strong odor of marijuana coming from the vehicle. RP 15.

Officer Gregorio asked for Wright's driver's license, his registration, and proof of insurance. RP 14. The officer told Wright why he had stopped him and indicated that the area was a hot spot for stolen cars, burglaries, and car prowls. RP 15, 20-21. Wright said he thought he had been stopped because he didn't have any lights and was backing up around his dad's house illegally. RP 15.

While still in the car searching for his registration and other papers, Wright told the officer that the car belonged to a friend. Wright gave the officer an expired insurance card, and said it was "good for whatever car he hopped in." RP 16. When asked for the registration papers, Wright reached for the glove box, then pulled his hand back, then reached for the glove box, and pulled his hand away again. RP 16. Wright grabbed a yellow piece of paper from the back seat of the car that showed a bill of sale indicating the car had been purchased in 2003. RP 16.

Wright then opened the glove compartment and Officer Gregorio saw a large roll of money. RP 16-17. Wright immediately closed the glove compartment. RP 17. Wright became nervous

and agitated, he began moving his hand uncontrollably and his eyes started to well up with tears. RP 17.

Officer Gregorio placed Wright under arrest for suspicion of possession of marijuana and then passed him over to Officer Larned who had arrived at the scene.³ RP 15. Larned arrived within five minutes of the initial stop, a standard response time in that area. RP 15-16.

Officer Larned, in his report, wrote that he was responding as back-up to Officer Gregorio on a traffic infraction and suspicious vehicle stop. RP 35-36. When asked about the meaning of the term "suspicious vehicle stop" Officer Gregorio replied that it could be "people sitting in a vehicle, high drug, high crime activity areas, driving slowly through neighborhoods in a blacked out, possibly casing neighborhoods, instances like that." RP 35.

A few minutes after his arrest, Officer Gregorio read Wright his Miranda rights while he was seated in the back seat of the patrol car and then asked him some questions.⁴ RP 18. When Officer Gregorio asked why he smelled marijuana in the car, Wright

³ On appeal, Wright is not challenging whether there was probable cause to place him under arrest after Officer Gregorio contacted him in the car.

⁴ On appeal, Wright has not challenged the voluntariness of any of his statements to police. This issue is discussed in the record at RP 17-23.

replied: "Why are you asking me this, sir. You said you pulled me over because you thought I had a stolen car. I told you I wasn't. Can't you give me a ticket and let me go, sir." RP 20. When the officer repeated the question, Wright said he had smoked some marijuana earlier. RP 20. Officer Gregorio testified that he had not told Wright that he had stopped him because he believed his vehicle was stolen, but had indicated that the area was a hot spot for stolen cars, burglaries, and car prowls. RP 20-21.

Wright continued to ask Officer Gregorio why he (the officer) was asking if there was any marijuana in the car. RP 21. He said the officer was "trying to stick it to him and put him in a bind." RP 21. Wright stopped answering questions and Officer Gregorio terminated the interview. RP 21.

Officer Gregorio then requested that a K-9 unit with a drug sniffing dog respond to the scene. RP 21. The dog search uncovered two baggies of marijuana and a prescription bottle of oxycodone (in the name of Roger Wright) in the console. It also uncovered two more baggies of marijuana and a scale in a larger bag in the back seat. RP 73. Subsequently, Officer Gregorio obtained a search warrant for the vehicle. A search of the trunk uncovered a small bag (9 grams) and a large bag (246 grams) of

marijuana. Also in the trunk was a Ziploc bag containing 250 pills of MDMA (ecstasy). RP 74-79.

The court took judicial notice that on November 26, 2006, sunset occurred at 4:21 p.m. RP 58. Officer Gregorio testified that he did not know what time the sun set that day. RP 24-25.

III. ARGUMENT

A. THE TRIAL COURT'S FINDINGS OF FACT ARE VERITIES ON APPEAL.

Wright has assigned error to the trial court's written "Findings of Fact and Conclusions of Law on CrR 3.6 Motion to Suppress Physical, Oral or Identification evidence." Appellant's Opening Brief, p. 1 (Assignment of Error 4). Wright, however, has made no argument relating to any of the written findings of fact adopted by the trial court. Absent any argument or citation to authority, these findings are verities on appeal. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005) ("Unchallenged findings of fact entered following a suppression hearing are verities on appeal.").

B. STANDARD OF REVIEW.

Conclusions of law from an order pertaining to the suppression of evidence are reviewed *de novo*. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002); State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002).

C. OFFICER GREGORIO HAD "REASONABLE AND ARTICULABLE SUSPICION" TO STOP WRIGHT'S CAR.

Wright contends that there was no probable cause or reasonable suspicion for Officer Gregorio to initiate the stop of his car. This is incorrect. To the extent that Wright asserts that the "probable cause" standard has not been satisfied, he is applying the wrong legal test. The correct test is whether the officer had "reasonable and articulable suspicion" to conduct an investigatory stop. Officer Gregorio's observation that the vehicle was being driven after dark without its lights constitutes "articulable suspicion" that a traffic infraction was occurring and is a legal basis to stop Wright's vehicle.

1. Legal standard: validity of investigative stops.

As a general rule, warrantless searches and seizures are *per se* unreasonable, in violation of the Fourth Amendment and article I, section 7 of the Washington State Constitution. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). There are, however, a few "jealously and carefully drawn" exceptions to the warrant requirement which provide for those cases where the societal costs of obtaining a warrant outweigh the reasons for prior recourse to a neutral magistrate. Williams, 102 Wn.2d at 736.

These exceptions include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and Terry investigative stops. State v. Rife, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997). The State carries the burden of showing that the particular search or seizure in question falls within one of these exceptions. Williams, 102 Wn.2d at 736; see also State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

Washington courts use the rationale set forth in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), when examining the validity of investigative stops. State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986). A Terry stop of a person or vehicle is justified if the officer can "point to specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrants the intrusion." Terry, 392 U.S. at 21; see also Kennedy, 107 Wn.2d at 6; State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982).

Thus, "[p]olice may conduct an investigatory stop if the officer has a reasonable and articulable suspicion that the individual is involved in criminal activity." State v. Walker, 66 Wn. App. 622, 626, 834 P.2d 41 (1992). A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is

about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). It is also described "as the ability to reasonably surmise from the information at hand that a crime was in progress or had occurred." Id. "The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991).

The rationale of Terry extends to traffic infractions, "due to the law enforcement exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel, as evidenced in the broad regulation of most forms of transportation." State v. Johnson, 128 Wn.2d 431, 454, 909 P.2d 293 (1996) (footnote omitted) (citing United States v. Ross, 456 U.S. 798, 806-07, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982)).⁵

Finally, officers need only reasonable suspicion, not probable cause, to stop a vehicle to investigate whether the driver committed a traffic infraction or a traffic offense.⁶ State v. Duncan, 146 Wn.2d 166, 173-74, 43 P.3d 513 (2002). "Less than probable

⁵ The Terry rationale does not extend to non-traffic infractions. See, e.g., State v. Day, 161 Wn.2d 889, 897, 168 P.3d 1265 (2007); State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

⁶ Wright initially states that Officer Gregorio did not have "probable cause" to initiate the stop; subsequently he sets out the "reasonable suspicion" standard.

cause is required because the stop is significantly less intrusive than an arrest." Kennedy, 107 Wn.2d at 6.

2. There was reasonable suspicion to stop Wright's vehicle.

Officer Gregorio had a reasonable and articulable suspicion that the vehicle he observed and subsequently stopped had committed a traffic infraction. The "totality of the circumstances" known to the officer at the inception of the stop were simple: It was dark outside, the weather was cold and icy, and the officer saw a car driving without its headlights. The vehicle continued to drive without its lights even after openly turning around and driving away from the officer's patrol car. In these circumstances, it was not unreasonable to conclude that the vehicle had committed a traffic infraction by driving without its headlights.

In response, Wright argues that the officer could not have had a "reasonable suspicion" to initiate the stop because a headlight infraction had technically not been committed.⁷ This argument is without merit. The test for the validity of investigative stops is not, and never has been, whether a crime or infraction

⁷ According to Old Farmers Almanac, on November 29, 2006, the sun set at 4:21 p.m. The stop was initiated at 4:45 p.m. The stop thus occurred 24 minutes after sunset, six minutes shy of half-an-hour after sunset, the mandatory time for all vehicles to have their headlights on pursuant to RCW 46.37.020.

could ultimately be proven in court. Indeed, if this were the case, it would raise the standard higher than that of "probable cause." All that is required is a "reasonable suspicion" that a crime or infraction has been committed. It is always possible that, upon further investigation, it might be determined (by the officer, the prosecutor, or the finder-of-fact) that a crime or traffic infraction that triggered the initial investigation had not in fact occurred. This does not void the underlying validity of the stop.

To take a simple example, an officer might stop a vehicle based on a reasonable suspicion that it was stolen (i.e., from eyewitness reports or a license plate check). Subsequent investigation might reveal that the vehicle was not stolen. This would not mean that there was no legal basis to have initiated the stop; nor would it mean that any evidence of some other crime, found as a result of the initial stop is not admissible in court.

Officer Gregorio rationally concluded that a traffic infraction had been committed when he saw a vehicle driving without its headlights while it was dark outside. The reasonableness of the officer's belief that the infraction had been committed is confirmed by the fact that there were only four minutes to go before it was half-an-hour after sunset. This was the information "at hand" to the

officer when he observed the vehicle. The officer should not be required to check the Farmers Almanac to determine what time the sun set before initiating a stop. Stopping a vehicle that is driving without its headlights in a residential area when it is dark and icy was within the scope of the officer's community caretaking function and is "reasonable and articulable" suspicion that a driving infraction has taken place. .

Wright's suggestion that this case is controlled by the holding in State v. Montes-Malindas, 144 Wn. App. 254, 256-57, 182 P.3d 999 (2008) is incorrect. In Montes-Malindas, a police sergeant, after viewing the suspicious behavior of occupants of a van in a parking lot, decided to watch the van. The officer observed the van leave a parking lot without its headlights on and decided to follow the vehicle. Then, *after the headlights were turned on a short time later*, the officer pulled the van over. Id. at 257-58. Among other things, the Court of Appeals noted that "it is not reasonable to stop a car only after its lights have been turned on." Id. at 262.

Montes-Malindas is primarily a "pretext" case, and is discussed in more detail below. However, contrary to Wright's suggestion, it is not "closely on point" with the present case. One

obvious difference is that the headlights of the vehicle in Montes-Malindas had been turned on when the officer initiated the stop. Thus, there was no reasonable basis to assume that a traffic infraction was taking place when the officer in Montes-Malindas stopped the vehicle. By contrast, there was a potential ongoing traffic infraction when Officer Gregorio stopped Wright's vehicle.

In sum, Officer Gregorio had a reasonable and articulable suspicion that justified stopping Wright's vehicle: the commission of what he perceived to be a headlight infraction. The fact that this infraction had technically not been committed does not render his decision to stop the vehicle "unreasonable" or improper.

D. OFFICER GREGORIO DID NOT ENGAGE IN A "PRETEXT" STOP.

Wright also contends that Officer Gregorio engaged in a "pretext stop." The evidence does not support this argument.

1. Legal standard: "pretext" stops.

A pretextual traffic stop violates article I, section 7 of the Washington Constitution because it is a warrantless seizure without proper justification. State v. Ladson, 138 Wn.2d 343, 353, 979 P.2d 833 (1999). The essence of a pretextual traffic stop is that the police stop a citizen, not to enforce the traffic code, but to

investigate conduct (for which they do not have probable cause or reasonable suspicion) unrelated to driving. 138 Wn.2d at 349.

“The question [is] whether the fact that someone has committed a traffic offense, such as failing to signal or eating while driving, justifies a warrantless seizure which would not otherwise be permitted absent that ‘authority of law’ represented by a warrant.”

Ladson, 138 Wn.2d at 352 (footnotes omitted). In evaluating whether a stop is pretextual, courts consider the totality of the circumstances. This includes both the subjective intent of the officer and the objective reasonableness of the officer’s behavior. 138 Wn.2d at 358-59 (disapproving the purely objective inquiry in State v. Chapin, 75 Wn. App. 460, 464, 879 P.2d 300 (1994)).

Ladson makes clear, however, that police officers may still enforce the traffic code, so long as they do not use that authority as a pretext to avoid the warrant requirement for an unrelated criminal investigation. Ladson, 138 Wn.2d at 357; see also State v. Hoang, 101 Wn. App. 732, 739, 6 P.3d 602 (2000).

In addition, it is not relevant whether the police or prosecutor actually pursue the crime or infraction that was the basis for the original stop: “We find nothing in Ladson that limits prosecutorial discretion with respect to charging decisions, or that requires police

to issue every conceivable citation as a hedge against an eventual challenge to the constitutionality of a traffic stop allegedly based on pretext." Hoang, 101 Wn. App. at 742.

2. This was not a "pretext" stop.

The undisputed evidence demonstrates that, objectively and subjectively, Officer Gregorio did not engage in a "pretext" stop.

First, Officer Gregorio did not observe any suspicious activity involving the vehicle or its passenger prior to observing the potential infraction. The first contact the officer had with the vehicle was when he observed it driving without its headlights on. As he pulled toward the vehicle, it then engaged in arguably suspicious behavior (turning around and driving away from the patrol car). This is not a case in which an officer's suspicions were aroused by one thing (i.e., behavior by individuals loitering in a parking lot) and the stop subsequently initiated to confirm or deny those suspicions.

Second, Officer Gregorio did not observe or "surveil" the vehicle or its occupants before initiating the stop. Indeed, the stop occurred within seconds of the officer observing that the vehicle's headlights were out. This is not a case where an officer decided to follow a vehicle or suspect to see if they committed an infraction in order to initiate a stop that would otherwise require a warrant.

Third, Officer Gregorio routinely stopped vehicles that were driving at night without headlights as part of his duties as a patrol officer. This is an obvious and appropriate aspect of his community caretaking responsibilities. This is not a case in which an officer chose to enforce a traffic infraction outside the normal sphere of his responsibility. Nor is it a case in which an officer selectively chose to enforce traffic infractions.

Fourth, and perhaps most importantly, Officer Gregorio could not see inside the vehicle to identify the driver or any occupants. This is not a case in which an officer was previously familiar with the driver of the vehicle and chose to stop the vehicle for that reason. In addition, contrary to Wright's suggestion on appeal, this is not a case in which an officer stopped the vehicle simply because the occupant was a "black male."

Together, these facts establish that there was no pretextual reason underlying Officer Gregorio's decision to stop the vehicle. The reason for the stop was because the vehicle was driving without its headlights when it was dark outside, a potential violation of the traffic code.

Wright asserts that, because Officer Gregorio was aware that the general area was a "hot spot" for robberies and car prowls,

and considered Wright's vehicle to be "suspicious," it is necessary to conclude that the stop must have been a "pretext." This is incorrect.

Officers need not, and should not, set aside their knowledge and awareness of their surroundings and environment when deciding to initiate a stop. Awareness of such factors is essential to officer safety. Moreover, it is precisely such areas that demand the attention of patrol officers. The fact that Officer Gregorio had decided to stop a vehicle with an unknown number of occupants, that the vehicle drove away from the officer when the patrol car came into view, and that the officer was in an area known for criminal activity, entirely justifies his decision to deem it a "suspicious vehicle" and request a back-up officer.

Moreover, the standard implicit in Wright's argument is ultimately unworkable. An officer cannot ignore his knowledge of crime patterns for the area in which he patrols; such knowledge is an essential part of his job function. The officer's recognition of his environment does not turn every investigation of a traffic infraction into a "pretext" stop. An officer is entitled to enforce the traffic code – specifically to include traffic infractions that are directly observed – regardless of the surroundings in which they occur. Nor should

an officer be required to ignore appropriate safety precautions, and set aside safety concerns, simply in order to establish that the stop is not a "pretext."

Significantly, State v. Hoang, 101 Wn. App. 732, 742, 6 P.3d 602 (2000), rejected the suggestion that because a traffic stop occurs in a known "hot spot" for crime there is an inference that the stop is pretextual:

Hoang's position in this appeal is tantamount to a contention that this court may look behind an unchallenged finding of fact that the traffic stop in question would have been made in any event, and *conclude instead as a matter of law that the stop was unconstitutionally pretextual merely because the officer who made the stop first saw the vehicle while observing a narcotics hotspot and saw the driver of the vehicle engage in behavior that could be entirely innocent (such as asking for directions) or not entirely innocent (such as asking if drugs were for sale) – and because the officer, not being entirely naïve, suspected that the behavior was not entirely innocent.* But Ladson does not stand for that proposition. *Under Ladson, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop.*

Hoang, 101 Wn. App. at 742 (emphasis added).

In the present case, the undisputed findings of fact demonstrate that Officer Gregorio had a reasonable and articulable suspicion of a potential traffic infraction. As Hoang makes clear,

even if Officer Gregorio was also presented with information that could be deemed suspicious, that knowledge does not preclude him from initiating a stop to investigate the infraction.

Finally, the facts of the present case are distinguishable from Ladson, Montes-Malindas, and Myers, the cases relied upon by Wright on appeal.

In Ladson, gang patrol officers admitted they used traffic infractions in order to initiate contact and questioning regarding unrelated criminal activity. The officers would follow vehicles they believed might be involved in drug dealing, hoping to find a "legal" reason to stop the vehicle (such as an expired tab). In addition, making routine traffic stops was not the primary responsibility of the gang patrol. Ladson, 138 Wn.2d at 346-47. In sum, the officers in Ladson improperly used traffic infractions as a means to avoid the warrant requirement and pursue criminal investigations.

None of the factors in Ladson are present in this case. Officer Gregorio was a patrol officer whose regular duties included enforcing traffic infractions and who routinely stopped people for driving at night without headlights. He was not conducting a criminal investigation nor had he focused on this vehicle or its

occupant(s) as possibly being involved in criminal activity. The two scenarios could not be more different.

In Montes-Malindas, a sergeant was involved in an unrelated investigation when he saw Montes-Malindas and two other individuals "acting nervously" in a van parked in a store parking lot. After concluding his other investigation, the officer watched one of the van occupants get out and leave in another occupied car. He continued to watch as Montes-Malindas and the individual in the van's driver's seat switched places. To avoid being seen by Montes-Malindas and his companions, the officer moved his car to a business across the street. From this location he watched the occupants of the van go into the store and return with a female. When the van pulled out of the parking lot, it did not have its headlights on. The officer pulled behind the van, which drove for about 100 yards before illuminating its headlights. After radioing for back-up, the officer stopped the van. 144 Wn. App. at 257-58. The Court of Appeals ruled that this was a pretextual stop. Id. at 262.

These facts are significantly different from the present case. Officer Gregorio had not targeted Wright or his vehicle for investigation. The officer also did not watch or "surveil" Wright, he did not follow Wright's vehicle for any length of time, and Wright's

headlights were still not on when the stop was initiated. Contrary to Wright's suggestion on appeal, the facts of Montes-Malindas are not "closely on point" with those of the present case.

In State v. Myers, 117 Wn. App. 93, 95, 69 P.3d 367 (2003), a sheriff's deputy recognized Myers as someone who had a suspended driver's license approximately a year ago. Before actually confirming that Myers's license was still suspended, the officer followed Myers and saw him make two lane changes while signaling simultaneously, an infraction. The deputy stopped Myers because, he "had, you know, two infractions so I just went ahead and stopped them and *thought I would just go and contact them and verify it [the driver's status] that way.*" 117 Wn. App. at 95 (emphasis added). The Court of Appeals held this was a pretextual stop. 117 Wn. App. at 97-98.

Unlike the situation in Myers, Officer Gregorio did not know Wright, could not see that Wright was driving the car, and did not stop Wright to confirm his driver's status or to further any other investigation.

In sum, the trial court's reasoning that this was not a pretextual stop was sound:

Here, Officer Gregorio observed the infraction when the vehicle first came into view and immediately initiated the traffic stop. There is no indication that Officer Gregorio was acting outside his routine traffic patrol duties or that he handled the initial stop differently than any other routine traffic stop. Further, given the almost simultaneous timing of the officer's first observation of the defendant's vehicle, observation of the traffic infraction, an initiation of the stop, there was no time for Officer Gregorio to develop a motive to conduct a criminal investigation and then cover it up with a false reason. On these facts, the stop was not pretextual.

CP 86 (Written Findings of Fact and Conclusions of Law, p. 6).

There is no basis to conclude that Officer Gregorio engaged in a pretext stop of Wright's vehicle.

E. THERE IS NO BASIS TO SUPPRESS EVIDENCE OR DISMISS WRIGHT'S CONVICTIONS.

The State agrees that if Officer Gregorio did not have a reasonable and articulable suspicion to stop Wright's vehicle, or if his reason for the stop was a "pretext," then the stop would be improper, the evidence recovered during the subsequent search should be suppressed, and there would be no basis to support the trial court's finding of guilt on either count I or II. However, as discussed in detail above, Officer Gregorio did have a reasonable basis to initiate the stop and his reason for doing so was not a "pretext." Accordingly, there is no ground to reverse Wright's convictions.

IV. CONCLUSION

For the reasons outlined above, the State respectfully requests that Roger Wright's two convictions for violating the Uniform Controlled Substances Act be affirmed.

DATED this 26th day of January, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

STEPHEN P. HOBBS, WSBA #18935
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002